# Michael Brian Davis v Microsoft (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING MOTION NO R2–25–77 OF 1999
FAIZA TAMBY CHIK J
18 APRIL 2000

***Labour Law*** *— Employment — Dismissal — Constructive dismissal — Persistent requests to employee to resign — Attempt to put employee on performance improvement plan, whether a sham — Whether employer showed intention — no longer wanted to be bound by contract of employment*

The applicant was an employee of the respondent since 1995. Sometime in August 1997, the applicant was informed by the respondent's new Managing Director (Mr Blas) to attend a meeting in Kuala Lumpur to discuss the applicant's performance in the company. The meeting was attended by the applicant, Mr Blas and En Jamal (COW-1). COW-1 testified in the Industrial Court that prior to the meeting he was instructed by Mr Blas to prepare a release agreement (resignation) for the applicant. COW-1 further testified that he and Mr Blas attended this meeting purely with the release agreement for the applicant to sign and that the applicant's performance was not discussed. The respondent had also prepared a draft resignation letter for the applicant to sign. The applicant testified that he was surprised because he expected to discuss his performance but instead was asked to resign. The applicant never indicated that he intended to resign and Mr Blas told him to consider and to revert to him by 2 September 1997. Notwithstanding the applicant had informed the respondent on 2 September 1997 that he had no intention of resigning, the respondent yet again on 15 September 1997 persisted in asking him to resign. The applicant testified that it then became very clear to him that the respondent's purported attempt to put him on a performance improvement plan ('PIP') was actually a sham and that the respondent's true intention was to force him out of his employment. The applicant contended that by repeatedly asking him to resign, the respondent had breached the contract of employment as it clearly had evinced the intention of no longer wanting to be bound by his contract of employment. The Industrial Court in holding that there was no dismissal in essence based its decision on the fact that an employer is at liberty to give an employee an option to resign on mutually agreed terms. The applicant filed an application to quash the Industrial Court's award.

**Held,** allowing the application:

(1) The Industrial Court failed to take into consideration the issue of whether or not the conduct of the company evinced any intention no longer wanting to be bound by the contract of employment. Thus it had erred in law as it had failed to take into account a relevant consideration (see p 675G–I).

(2) The Industrial Court committed a grave error of law in relying on the English cases as a perusal of the cases showed that the facts in those cases were totally different and distinguishable. In the present case, the applicant never agreed to resign let alone on any mutually agreed terms. In any event, the English cases relied on by the Industrial Court cannot be relied upon for the proposition that there is no dismissal if an employer persistently requests an employee to resign (see pp 676F–677C).

(3) The respondent had approached the applicant with prepared letters of resignation and agreement of release which was merely a polite way of telling the applicant that he was being dismissed. At the very least, such conduct of an employer showed the intention that they no longer wanted to be bound by the contract of employment. The course of conduct of the respondent was with the deliberate and dominant purpose of coercing the applicant to resign and hence amounted to constructive dismissal (see pp 680B–C, 681C).

(4) The Industrial Court had failed to have regard and to take into account the sequence and chain of events namely that long before the respondent presented the PIP to the applicant, the applicant was requested to resign on no less than two occasions. This undisputed fact can only lead to the conclusion that the whole PIP was a sham. Under the circumstances, the Industrial Court in proceeding on the basis that the claimant was pleading 'constructive dismissal' on the ground of being placed on the PIP clearly took into account irrelevant consideration and hence committed an error of law (see p 682C–D).

(5) In the light of the company's own evidence, the Industrial Court in reaching the conclusion that the claimant had wilfully refused to be put on the PIP had failed to have regard to the evidence adduced and came to the decision which was so perverse and devoid of plausible justification (see p 683E).

**[Bahasa Malaysia summary**

Pemohon adalah pekerja responden sejak 1995. Dalam bulan Ogos 1997, pemohon telah diberitahu oleh Pengarah Urusan responden yang baru (En Blas) untuk menghadiri suatu mesyuarat di Kuala Lumpur untuk membincangkan prestasi pemohon di dalam syarikat tersebut. Mesyuarat tersebut dihadiri oleh En Blas dan En Jamal (COW-1). COW-1 memberi keterangan di Mahkamah Perusahaan bahawa sebelum mesyuarat tersebut beliau telah diarahkan oleh En Blas untuk menyediakan suatu perjanjian pelepasan (perletakan jawatan) untuk pemohon. Selanjutnya COW-1 memberi keterangan bahawa beliau dan En Blas menghadiri mesyuarat ini dengan membawa bersama perjanjian pelepasan untuk ditandatangani oleh pemohon dan prestasi pemohon tidak dibincangkan. Responden juga telah menyediakan suatu draf surat perletakan jawatan untuk

A ditandatangani oleh pemohon. Pemohon memberikan keterangan bahawa beliau terkejut kerana beliau sebenarnya menjangkakan untuk berbincang mengenai prestasinya tetapi sebaliknya diminta untuk meletak jawatan. Pemohon tidak menunjukkan bahawa beliau berniat untuk meletak jawatan dan En Blas memintanya untuk mempertimbangkannya dan memberinya balasan selewat-lewatnya pada B 2 September 1997. Walau sekalipun pemohon telah memberitahu responden pada 2 September 1997 bahawa beliau tidak mempunyai niat untuk meletak jawatan, responden sekali lagi tetap memintanya untuk meletak jawatan. Pemohon memberikan keterangan bahawa adalah jelas kepadanya pada masa itu bahawa cubaan responden C untuk meletakkannya di dalam pelan peningkatan prestasi ('PPP') adalah suatu pemalsuan dan niat sebenar responden adalah untuk menyingkirkannya daripada pekerjaan. Pemohon menegaskan bahawa dengan menanya berkali-kali untuk meletak jawatan, responden telah melanggar kontrak pekerjaan kerana ia jelas menunjukkan niat untuk tidak mahu lagi diikat oleh kontrak D pekerjaannya. Mahkamah Perusahaan di dalam memutuskan bahawa tidak terdapat pemecatan pada asasnya mendasarkan keputusannya kepada fakta bahawa seorang majikan adalah bebas untuk memberikan pekerja pilihan untuk meletak jawatan di atas terma-terma yang dipersetujui. Pemohon telah memfailkan permohonan untuk membatalkan award Mahkamah Perusahaan tersebut.

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**Diputuskan**, membenarkan permohonan tersebut:

(1) Mahkamah Perusahaan telah gagal untuk mempertimbangkan isu sama ada atau tidak tindakan syarikat tersebut menunjukkan niat untuk tidak mahu lagi diikat oleh kontrak pekerjaan. Oleh itu, ia F telah silap dari segi undang-undang oleh kerana ia gagal untuk mengambil kira pertimbangan yang relevan (lihat ms 675G–I).

(2) Mahkamah Perusahaan telah melakukan kesilapan undang-undang yang besar dengan bergantung kepada kes-kes Inggeris kerana pembacaan kes-kes tersebut menunjukkan bahawa fakta-G fakta di dalam kes-kes tersebut adalah berbeza sama sekali dan boleh dibezakan. Di dalam kes ini, pemohon tidak pernah bersetuju untuk meletak jawatan di atas sebarang persetujuan terma-terma secara bersesama. Walau apa sekalipun, kes-kes Inggeris yang digantung harap oleh Mahkamah Perusahaan tidak boleh dijadikan dasar untuk hujahan bahawa tidak terdapat H pemecatan jika seorang majikan berterusan meminta seorang pekerja untuk meletak jawatan (lihat ms 676F–677C).

(3) Responden telah bertemu dengan pemohon dengan surat perletakan jawatan yang telah disediakan dan perjanjian pelepasan yang hanyalah suatu cara yang sopan untuk memberitahu pemohon bahawa beliau dipecat. Paling kurang, I tindakan sedemikian seorang majikan menunjukkan niat bahawa mereka tidak mahu lagi diikat oleh kontrak pekerjaan tersebut. Perjalanan tindakan responden adalah disengajakan dan tujuan

dominannya adalah untuk memaksa pemohon untuk meletak jawatan dan dengan itu terjumlah kepada pemecatan konstruktif (lihat ms 680B–C, 681C). A

(4) Mahkamah Perusahaan gagal untuk memberi perhatian dan mengambil kira turutan dan rantaian peristiwa iaitu bahawa jauh sebelum responden mengemukakan PIP kepada pemohon, pemohon telah diminta untuk meletak jawatan sekurang-kurangnya dua kali. Fakta yang tidak dipertikaikan ini hanya boleh membawa kesimpulan bahawa keseluruhan PIP adalah suatu pemalsuan. Di bawah keadaan-keadaan tersebut, Mahkamah Perusahaan di dalam bertindak atas dasar tersebut bahawa pihak yang menuntut telah memplid 'pemecatan konstruktif' di atas alasan diletak di dalam PIP dengan jelas mengambil kira pertimbangan yang tidak relevan dan dengan itu melakukan kesilapan undang-undang (lihat ms 682C–E). B C

(5) Memandangkan keterangan syarikat itu sendiri, Mahkamah Perusahaan di dalam mencapai kesimpulannya bahawa pemohon telah sengaja enggan diletak di dalam PIP telah gagal untuk memberi perhatian kepada keterangan yang dikemukakan dan mencapai suatu keputusan yang terlalu menyimpang dan langsung tidak mempunyai justifikasi yang munasabah (lihat m 683E).] D

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**Notes**

For cases on dismissal, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 723–730.

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**Cases referred to**

*Ang Beng Teik v Pan Global Textile Bhd Penang* [1996] 3 MLJ 137 (refd)

*Auckland Shop Employee's Union v Woolworths (NZ Limited)* [1985] 2 NZLR (refd)

*BBC Brown Boveri (M) Sdn Bhd v Yau Hock Heng* [1990] 2 ILR 2 (refd) G

*Birch & Anor v Liverpool University* [1985] ICR 470 (refd)

*Logan Salton v Durham Country Council* [1989] IRLR 99 (refd)

*Mattel Tools Sdn Bhd. v Gerard Wong Koon Seng* [1994] 2 ILR 950 (refd) H

*Sheffield v Oxford Controls Co Ltd* [1979] ICR 396 (refd)

*Stanley Ng Peng Hon v AAF Pte Ltd* [1979] 1 MLJ 57 (refd)

*Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372 (refd)

*Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 (refd) I

*Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 (refd)

A *Anand Ponnudurai* (*Sri Ram & Co*) for the applicant.
*S Suganthi* (*Shearn Delamore & Co*) for the respondent.

**Faiza Tamby Chik J**: The applicant commenced employment with Microsoft Inc vide a letter of appointment dated 11 September 1995 in the position of Business Development Manager based in Vietnam for a fixed B term of two years (see p 6 of encl 1). The applicant then entered into a contract of employment with the respondent on 30 December 1996, wherein he was to be based in Malaysia for a fixed period of two years (see p 51 of encl 1). Sometime in August 1997, the applicant was informed by the respondent's new Managing Director (Mr Blas) to attend a meeting in Kuala Lumpur to discuss the applicant's performance in the company. C There was no dispute that this meeting was in fact held on 29 August 1997 between the applicant, Mr Blas and En Jamal (COW-1 in the Industrial Court).

COW-1 testified in the Industrial Court that prior to this meeting he was instructed by Mr Blas to prepare a Release Agreement (resignation) for D the applicant of which, such agreement was prepared by the respondent's lawyer. COW-1 further testified that he and Mr Blas attended this meeting purely with the Release Agreement for the applicant to sign and that the applicant's performance was not discussed. (The said Release Agreement prepared by the respondent appears in pp 65 to 72 of encl 1). The respondent had also prepared a draft resignation letter for the applicant to E sign (see p 73 of encl 1). The applicant testified that he was surprised because he expected to discuss his performance but instead was asked to resign. The applicant never indicated that he intended to resign and Mr Blas told him to consider and to revert to him by 2 September 1997. The applicant then had a meeting on 2 September 1997 and gave the respondent a letter dated 2 September 1997 informing the respondent that F he did not wish to resign. (see p 74 of encl 1). The respondent never replied to the letter. The applicant was again asked to attend a meeting on 15 September 1997. At the said meeting, the applicant gave the respondent a letter dated 15 September 1997 (see p 75 of encl 1). At the said meeting, Mr Blas gave the applicant a letter on his purported poor performance. (see G pp 77 and 78 of encl 1). It is interesting to note that notwithstanding the applicant having informed the respondent on the 29 August 1997 and 2 September 1997 that he had no intention of resigning, the respondent yet again on 15 September 1997, persisted in asking him to resign and had gone to the extent of preparing another resignation letter and an agreement of release for the applicant to sign (see pp 79 and 80 of encl 1). The applicant H testified that it then became very clear to him that the respondent's purported attempts to put him on a Performance Improvement Plan (PIP) was actually a sham and that the respondent's true intention was to force him out of his employment. Hence, the applicant then sent a letter dated 16 September 1997, outlining in detail the sequence of events and pleaded constructive dismissal (see pp 81 and 82 of encl 1). The applicant's main I contention in the Industrial Court was that the conduct of the respondent in attempting to put him on the PIP was a sham because it was clear that the respondent's main objective was to get the applicant to resign.

The applicant contended that by repeatedly asking him to resign, the respondent had breached the contract of employment as it clearly had evinced the intention no longer wanting to be bound by his contract of employment. The Industrial Court in holding that there was no dismissal, in essence based it's decision on the fact that an employer is at liberty to give an employee an option to resign on mutually agreed terms.

The applicant was seeking to quash Industrial Court Award No 276 of 1999 on three main grounds as elicited in the statement pursuant to O 53 and as amplified in paras 12, 13 and 14 of the applicant's affidavit affirmed on 19 July 1999 (encl 1). The Industrial Court, at p 17 of the award, held as follows:

> The next question for the court to consider is whether the request for the claimant to resign by providing him with a monetary package is in a breach of his contract of employment. It has been established that the employer is at liberty to propose that any employee leave his employment by payment of an agreed compensation and if the employee accepts his proposition then there is no dismissal. However, if an employee is threatened that if he did not resign he would be dismissed and the threat caused the resignation that amounted to a dismissal in law. See *Sheffield v Oxford Controls Co Ltd* [1979] ICR 396; *Birch & Anor v Liverpool University* [1985] ICR 470 and *Logan Salton v Durham Country Council* [1989] IRLR 99. Hence the court opines that the option to resign was clearly not a breach of the claimant's contract.

I am of the opinion that in arriving at the above conclusion, the Industrial Court:

(a) came to a decision which was so perverse and devoid of plausible justification that no reasonable body of persons or tribunal in similar circumstances could have reached;

(b) erred in law when it relied on the English cases of *Sheffield v Oxford Controls, Birch v Liverpool University* and *Logan Salton v Durham County Council* when it ought to have addressed it's mind to the Malaysian cases on the issue of an employer requesting an employee to resign as these cases are of persuasive authority only (see s 3 CLA 1956);

(c) erred in law in it's application of *Wong Chee Hong*'s case when it totally failed to consider whether or not the conduct of the respondent evinced an intention no longer wanting to be bound by the applicant's contract of employment any longer.

The doctrine of constructive dismissal in this country has been expounded in the locus classicus case of *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* [1988] 1 MLJ 92 at p 95 wherein it was held:

> It is in connection with the interpretation of para (c) of sub-s (2) that the doctrine of 'constructive dismissal' became currently used and gave rise to so much divergence of opinions until it was finally put to rest by the Court of Appeal in *Western Excavating (ECC) Ltd v Sharp* [1978] IRLR 27.
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> The common law has always recognized the right of an employee to terminate his contract of service and therefore to consider himself as discharged from further obligations if the employer is guilty of such breach as affects the foundation of the contract or if the employer has evinced or shown an intention not to be bound by it any longer. It was an attempt to enlarge the

right of the employee of unilateral termination of his contract beyond the perimeter of the common law by an unreasonable conduct of his employer that the expression 'constructive dismissal' was used. It must be observed that para (c) never used the words 'constructive dismissal'. This paragraph simply says that an employee is entitled to terminate the contract in circumstances entitling him to do so by reason of his employer's conduct. But many thought and a few decisions were made that an employee in addition to his common law right could terminate the contract if his employer acted unreasonably. Lord Denning MR, with whom the other two Lord Justices in the case of *Western Eexcavating* agreed, reiterated an earlier decision of the Court of Appeal presided by him (see *Marriott v Oxford & District Co-operative Society Ltd* [1969] 3 All ER 1126) and rejected this test of unreasonableness. In no uncertain terms, the learned Master of the Rolls declared that the test of dismissal in respect of para (c) is a contract test. In his view, the Act draws a distinction between 'dismissal' which is in one section, and 'unfairness' which is in another section, and moreover the paragraph is using legal connotations, such as the words 'notice' and 'entitled'.

Thus it is clear that even in England 'constructive dismissal' does not mean that an employee can automatically terminate the contract when his employer acts or behaves unreasonably towards him. Indeed if it were so, it is dangerous and can lead to abuse and unsettled industrial relations. Such a proposition was rejected by the Court of Appeal. What is left of the expression is now no more than the employee's right under the common law, which we have stated earlier, and goes no further. Alternative expressions with the same meaning, such as 'implied dismissal' or even 'circumstantial dismissal', may well be coined and used. But all these could not go beyond the common law test.

Therefore the tests for establishing constructive dismissal is two pronged, namely:

(i) is there a breach of contract; or

(ii) has the employer evinced any intention not wanting to be bound by the contract any longer.

A perusal of the Industrial Court Award (see exh 'MD-8' of encl 8) will clearly show that the Industrial Court only addressed it's mind to the issue of breach of contract and totally failed to take into consideration the issue of whether or not the conduct of the company evinced any intention of no longer wanting to be bound by the contract of employment.

A perusal of the applicant's counsel's written submission in the Industrial Court (see exh 'MD-6' of encl 1) would clearly show that the crux of the applicant's case in the Industrial Court was that the respondent's conduct of persistently trying to get him to resign clearly showed the respondent's intention of no longer wanting to be bound by his contract of employment. The Chairman of the Industrial Court, in totally not considering the disjunctive second limb of *Wong Chee Hong*'s case has clearly erred in law as it had failed to take into account a relevant consideration. Apart from failing to take into account such relevant consideration, I am of the view that in misapplying the principle of law as expounded in *Wong Chee Hong*'s case, the Industrial Court has committed an error of law. As stated by Gopal Sri Ram JCA in the case of

*Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317 at p 342: A

> In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdictional or not. If an inferior tribunal or other public decision-taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see *Raja Abdul Malek Muzafer Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision. B C
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> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law should be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law. D
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> Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted.

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The Industrial Court in it's award relied on the English cases of *Logan Salton v Durham County Council* and *Sheffield v Oxford Controls* in reaching it's decision that an employer is at liberty to propose to an employee to resign. My view is that in doing so, the Industrial Court committed a grave error of law as a perusal of these two English cases will clearly show that the facts therein of those cases were totally different and distinguishable. In F *Sheffield v Oxford Controls Ltd* [1979] ICR 396, the Employment Appeal Tribunal in England dismissed the employee's claim as the employee therein had resigned voluntarily after he had agreed to satisfactory terms/ offer of financial benefits. There it was held:

> On the employee's appeal: G
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> Held, dismissing the appeal, that where an employee was threatened that if he did not resign he would be dismissed and the threat caused the resignation, that amounted to a dismissal in law; but where the resignation was brought about not by the threat of dismissal but by other factors such as the offer of financial benefits, there was no dismissal; that accordingly, since the employee had agreed satisfactory terms upon which he was prepared to resign so that the H threat of dismissal was not in fact the cause of his resignation, he had not been dismissed and the industrial tribunal's decision was correct.

In *Logan Salton (Appellant) v Durham Country Council (Respondents)* [1989] 1 RLR 99, the Employment Appeal Tribunal held that the employee's employment had been terminated by mutual agreement in accordance with an agreement, in which the employee had entered into I freely and without duress and under which he benefited from a financial consideration. The Employment Appeal Tribunal held:

A The EAT held:

> The Industrial Tribunal had not erred in holding that the appellant's employment had been terminated by mutual agreement in accordance with the terms of a valid agreement which the appellant had entered into freely and without duress and under which he benefited from a financial consideration. In reaching that decision, the Industrial Tribunal had not failed to take
B account of the fact that when the appellant agreed to those terms, he was aware that a recommendation had been made that he be summarily dismissed.

In the instant case the facts are totally different, ie the applicant never agreed to resign let alone on any mutually agreed terms. In any event, the English cases relied on by the Industrial Court cannot by any stretch of
C imagination be relied upon for the proposition that there is no dismissal if an employer persistently requests an employee to resign.

In fact, in the recent Court of Appeal decision of *Ang Beng Teik v Pan Global Textile Bhd Penang* [1996] 3 MLJ 137 at p 158, the Court of Appeal stated:

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> First, the United Kingdom legislation under which *Clarke* was decided differs from the Act in material respects. The Supreme Court in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd* recognized this and said so. We must, therefore, be very careful when we refer to English cases in this area of the law. We must on no account be swayed by them when interpreting s 20(1) of the Act.

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> Second, while the ordinary principles of common law relating to the discharge of a contract of service by repudiation and acceptance may continue to apply under the United Kingdom statute, they are wholly irrelevant to a case under s 20(1) of the Act. Industrial adjudication is not concerned with the technicalities that form part and parcel of the common law doctrine of repudiation. Indeed, s 30(5) of the Act expressly declares that the Industrial
F Court:
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> > '... shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.'
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> Accordingly, in our judgment, the Industrial Court — when it comes to deciding whether a workman was dismissed without just cause or excuse — is
G wholly unconcerned with whether there was a repudiation by the workman of his contract of employment which was accepted by the employer, but rather with the much broader question whether what happened to the workman was just and equitable. If, at the end of the day, it finds that the conduct of the workman in all the circumstances of the case was such that he deserved what he got, then, cadit quaestio. But, if it finds that the act or omission on the part
H of the employer that deprived the workman of his proprietary right to earn a living to have been without just cause or excuse, then it will, and must, interfere. It must set matters right by making an award in favour of the workman. It may reinstate him. Or, if reinstatement is not the appropriate relief, it will usually award him reasonable compensation according to the circumstances of the particular case.

I In contrast to the common law, the Malaysian courts consistently held that a forced resignation is indeed a dismissal. In *BBC Brown Boveri (M) Sdn Bhd v Yau Hock Heng* [1990] 2 ILR 2 at p 8 the Industrial Court said:

In the course of developing his arguments on the nature and effects of exhs CO-1 and CO-2, Mr Lobo has invoked the concept of indirect dismissal which I think is rather interesting but by no means irrelevant. What is this concept and what does it involve? A fair description of it can be found in a passage from *The Law of Redundancy* (by Cyril Grunfield) at p 110 therein which states:

> 'Indirect dismissal is not a special term of art. I am using the phrase to distinguish cases of termination by the employer in which, while he is not dismissed directly, he has also not broken the contract (or otherwise behaved) so as to justify constructive dismissal. Some important kinds of dismissal for redundancy take this form and it is useful to emphasize their character as dismissals by the employer. The most obvious kind of indirect dismissal is where the employer invites the employee to resign in circumstances in which it is clear that, otherwise, the employee will in any case be dismissed. The precise formulation by the employer is immaterial whether it be invitation, request or dictation so long as the substance of it is that the employer places his employee in a position in which the employee really has no option to tender his notice. In such a situation the reality is ... that the employee is dismissed.

The concept of indirect dismissal can be distilled from the various decisions of the industrial tribunals in England: see *Sutcliffe v Hawker Aviation Ltd* [1974] ITR 58 (NIRC).

In *Mattel Tools Sdn Bhd. v Gerard Wong Koon Seng* [1994] 2 ILR 950 at p 953:

> Now industrial tribunals have consistently held that a forced resignation is a dismissal. See *Scott v Formica Ltd* [1975] IRLR 105; *Spencer Jones v Timmens Freeman* [1974] IRLR 325. It has also been held that the use of persuasion by an employer to obtain an employee's resignation may be a dismissal; see *Bata (M) Bhd v Cik Normadiah bte Abu Suood* (Award No 323 of 1991) (Ruling).
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> From the evidence adduced before me, it is clear that there was some kind of threat and/or coercion and/or persuasion made by the production manager and the director of human resources as a result of which the claimant submitted his letter of resignation. Therefore, I hold that the claimant had not resigned voluntarily. This involuntary resignation by the claimant tantamounts to dismissal of the claimant by the company without just cause and excuse.
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> Reinstatement is not the right remedy. The court therefore orders compensation and back wages in accordance with its established norms as follows:

In the case of *Stanley Ng Peng Hon v AAF Pte Ltd* [1979] 1 MLJ 57, the issue before the High Court was similar to the instant case, ie did the employer's request to the employee to resign amount to a dismissal. The High Court in giving judgment to the plaintiff's employee stated at p 58 of the judgment as follows:

> The plaintiff's version is this. O'Callaghan came into his office and said: 'Stanley, I have to ask you for your resignation.' He asked for reasons, but O'Callaghan refused to disclose any reason. O'Callaghan then handed him an envelope and said: 'Stanley, I think you will find everything there.' Plaintiff maintains that he was shocked. He pleaded with O'Callaghan but to no avail. He was told to go home in the company's car and to return it to the company's

service station the next day. The plaintiff claims that he never had any intention of resigning; that the so-called resignation was a dismissal forced upon him and that in the letter he wrote the next morning he wrongly used the word 'resignation' instead of 'termination of employment'. He had written that letter in order to praise O'Callaghan and get a good testimonial from him.

O'Callaghan on the other hand states that he does not recollect asking plaintiff for his resignation. He says that he mentioned to the plaintiff that it was better for him to look for other work for which he was more suited than his capacity as manager of the defendant company. O'Callaghan admits that the plaintiff did ask him to explain specifically what were the problems and that he declined to do so. He says that he declined to do so because he wanted to give the plaintiff the opportunity to resign. He admits that if the plaintiff had not resigned he would have dismissed him.

O'Callaghan's intention to dismiss the plaintiff is also quite apparent from the fact that when he entered the plaintiff's room he had with him an envelope containing RM5,114 together with a statement showing how this sum was made up and he eventually handed this envelope to the plaintiff and left his room.

I accept the plaintiff's version. I have no doubt at all that when O'Callaghan asked for the plaintiff's resignation, he was in effect dismissing the plaintiff from his appointment. It was merely a polite way of telling the plaintiff that he was being dismissed. He had gone into the plaintiff's office with his mind made up to dismiss him and had with him an envelope containing a sum of money which he thought was all that the plaintiff was entitled to.

The above decision was cited with approval and followed by the Court of Appeal in *Ang Beng Teik*'s case wherein Gopal Sri Ram JCA held at p 149 as follows:

As we have said, in order for s 20(1) to bite, a workman must consider himself to have been dismissed without just cause or excuse. As demonstrated, he may treat some conduct on the part of his employer ... as amounting to a dismissal. It may, as in the illustration earlier given, be an order of demotion. Or it may be an order of transfer. The workman in question may consider his demotion or transfer as being the same as a dismissal. In the words of the Act, he 'considers that he has been dismissed'. But there has been no formal dismissal or termination. Yet the workman may have recourse to s 20. If it were not so, an employer can make a workman's life so intolerable so as to force him to resign and then boldly say that there was no dismissal. Even the common law recognizes that a dismissal may be disguised as a resignation: see *Stanley Ng Peng Hon v AAF Pte Ltd* [1979] 1 MLJ 57.

Where there is no formal order of dismissal, but there is conduct on the part of an employer which makes a workman consider that he has been dismissed without just cause or excuse, lawyers term such conduct as 'constructive dismissal'. There is no magic in the expression. It is only a convenient label to describe the kind of conduct we have referred to. It could be an order of transfer or of demotion. Or, it could be that the workman has been made redundant by the employer. Or, it may be a case where the workman is asked to retire. The categories are not, we emphasize, closed.

Where the workman challenges his employer's conduct, it is on the basis that the case is not one eg of true redundancy but a dismissal disguised as a redundancy or retirement. Or, the challenge may be on the ground that an

> order of demotion was made in order to force the workman out of his job. It is only when such a challenge is mounted that the question becomes germane. Whether the conduct complained of was in truth a dismissal cloaked as something else is a question of fact. But the facts must disclose that the particular workman considered that he was dismissed by the particular act - eg, of demotion.

It may be observed that in the instant case we have a situation where the employer had approached the employee with prepared letters of resignation and agreements of release which was merely a polite way of telling the applicant that he was being dismissed. At the very least, such conduct of an employer surely showed the intention that they no longer wanted to be bound by the contract of employment. In this regard, it is of utmost importance to note the evidence of COW-1 during the trial at the Industrial Court. When COW-1 was asked during cross examination, as to why the respondent did not just put the applicant on the PIP, but instead went through the whole rigmarole of asking the applicant to resign, he replied:

> Because Mr Blas informed me that it may be a better option for the claimant to resign.

This clearly showed that the main intention of the respondent was to get rid of the applicant.

The above principle was also fortified in the recent Court of Appeal decision of *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372. In that case, Haji Ison, upon being requested by the company, had resigned on mutually agreed terms. He subsequently took the position that his resignation was not voluntary. While the Industrial Court held that there was no dismissal, the High Court quashed the said award. The Court of Appeal affirmed the High Court's decision to quash the said award and held Haji Ison's dismissal to be without just cause or excuse.

It is interesting to note the New Zealand's approach to constructive dismissal. In *Auckland Shop Employee's Union v Woolworths (NZ Ltd)* [1985] 2 NZLR at p 374, Cooke J said as follows:

> Obviously there is a dismissal when an employer in fact 'dismisses' a worker in the ordinary meaning of the word. But the Arbitration Court has held in a line of cases that the concept is wider and includes constructive dismissal. In our opinion that is the correct approach. In the context of an Act aimed at good industrial relations it is right to assume that Parliament would have meant 'dismissal' to cover cases where in substance the employer has dismissed a worker although technically there has been a resignation.
>
> The comparable English legislation has an exhaustive definition of dismissal: Employment Protection (Consolidation) Act 1978, s 55. What the English Courts call constructive dismissal appears there to depend entirely on the words 'if ... the employee terminates that contract, with or without notice, in circumstances such that he is entitled to terminate it without notice by reason of the employer's conduct'. In New Zealand the courts are not tied to a statutory definition. It would be undesirable to try to visualise all the kinds of case which the Arbitration Court could properly treat as constructive dismissals, but it is not difficult to list some.

> The concept is certainly capable of including cases where an employer gives a worker an option of resigning or being dismissed; or where an employer has followed a course of conduct with the deliberate and dominant purpose of coercing a worker to resign. On the argument in this court it was made clear that the union does not contend that the present case falls within either of those categories.

In the instant case Mr Blas's course of conduct was with the deliberate and dominant purpose of coercing the applicant to resign and hence amounted to constructive dismissal.

At p 16 of the Industrial Court Award the Chairman held as follows:

> It is trite that the employer has the right to evaluate the performance of its employees at any time during their services. In the instant case it is abundantly clear that the company after having asessed the claimant's performance as unsatisfactory wanted to take remedial steps to assist the claimant to improve his performance by putting him on the PIP. However, the claimant pre-empted the company's action to do so and pleaded 'constructive dismissal' instead. The court opines that the company's action of placing him on the PIP is not a ground for the claimant' s pleading 'constructive dismissal'.

I am of the view that the Industrial Court in reaching the above decision had committed several errors of law for the following reasons. Firstly, the chairman has totally misconstrued the applicant's ground for claiming constructive dismissal. The applicant had never questioned the respondent's prerogative to place him on the PIP. The applicant's main complaint was that the continuing request for him to resign prior to being placed on the PIP showed that the respondent's intention of no longer wanting to be bound by the contract of employment and more so pointed to the irresistible conclusion that the whole PIP was indeed a sham.

In any event, a perusal of the notes of evidence will clearly show that the company, in particular Mr Blas, had never even assessed the claimant's performance nor found it to be unsatisfactory. It is interesting to note that COW-1's testimony in the Industrial Court on the issue of the claimant's performance (see p 38 of the Notes of Evidence — exh 'AP-1'). COW-1 testified as follows:

> I don't know what steps Mr Blas took to evaluate the claimant. After he joined the company in Malaysia, Mr Blas had a few weeks to evaluate the claimant. I don't know if he actually evaluated the claimant.
>
> Mr Blas went to the meeting only with this agreement. When I went to the meeting, there was no PIP.

In any event, COW-1 when questioned on the claimant's performance admitted that the claimant had scored a rating of 3.0, which means 'meets position requirements and expectations and accomplishes most or all objectives' (see p 36 of Notes of Evidence — exh 'AP-1'). Furthermore, COW-1 himself testified (see p 38 of Notes of Evidence) that the claimant's primary duties was as OCU Manager and that the claimant was given a satisfactory rating by Lauer in regards to OCU Manager. Therefore the Industrial Court in finding that 'it was abundantly clear that the claimant's performance is unsatisfactory' is clearly perverse.

The applicant had raised the issue in the Industrial Court as to why the company did not just immediately exercise its prerogative and put the claimant on the PIP on 29 August 1997 itself, COW-1 replied that 'because Blas informed me that maybe a better option for claimant to resign.' This piece of evidence clearly showed that the whole PIP was a sham and that the main intention of the respondent was to get rid of the applicant. The Industrial Court had failed to have regard and to take into account the sequence and chain of events, namely, that long before the respondent presented the PIP to the applicant, the applicant was requested to resign on no less than two occasions. This undisputed fact can only lead to the conclusion that the whole PIP was a sham. Under the circumstances, the Industrial Court in proceeding on the basis that the claimant was pleading 'constructive dismissal' on the ground of being placed on the PIP, clearly took into account an irrelevant consideration and hence committed an error of law. Furthermore, the Industrial Court in proceeding on the basis that the claimant's performance was unsatisfactory failed to consider the company's own evidence and therefore failed to take into account a relevant consideration and hence committed an error of law. The Industrial Court had failed to take relevant matters into consideration particularly the sequence and chain of events wherein it would have clearly shown that the applicant was asked to resign on two occasions, even before being presented with the purported Performance Improvement Plan (PIP).

At p 15 of the said Award (at p 253 of encl 1) the Industrial Court held as follows:

> The reason the claimant gave as to why he considered the PIP to be a sham was because of what he perceived to be the company's apparent eagerness in persuading him to resign. However, there is no evidence produced to indicate that the company had insisted that the claimant resign. The company merely gave him an option to resign.
>
> It is the court's view that the claimant's willful refusal to be put on the PIP was clear rejection by him of the company's authority to make attempts to improve his performance. In spite of his act of defiance the company however did not dismiss him immediately but gave him the opportunity to consider his decision. Nevertheless the claimant left the company and claimed 'constructive dismissal'.

After a careful perusal of the above, it is obvious that the Industrial Court proceeded on the basis that there was no evidence that the company had insisted that the claimant resign, and that the claimant had willfully refused to put on the PIP and was a clear rejection by him of the company's authority to make attempts to improve his performance.

It must be noted that there was no dispute whatsoever from the company that the company had on two occasions prepared letters of resignation for the applicant to sign. The Industrial Court appeared to have been more concerned with semantics ie the words 'insisted' as opposed to 'option'. It must be seen that presenting a resignation letter for the applicant to sign on two occasions surely must amount to insisting that the applicant resign. It is also apparent that the Chairman of the Industrial Court was very

much swayed by the fact that the applicant had rejected the company's authority to improve his performance as he willfully refused to be put on the PIP. The applicant's own evidence before the Industrial Court was that he never questioned the company's rights to put him on the PIP but because of the persistent attempts to get him to resign, he was of the view that the PIP was a sham. At p 28 of the Notes of Evidence (exh 'AP-1'), the claimant in no uncertain terms testified as follows:

> At this point of time I was not aware of what the PIP entailed as of 3 September 1997. I never questioned the PIP. I questioned the way they treated me. With Lauer — no problem with the PIP I was willing to improve my performance.

It is interesting to note that the company's own evidence on this issue. COW-1, at p 32 of the Notes of Evidence testifies as follows:

> The company thought that the claimant had rejected the offer to resign voluntarily — he did want to leave and he wanted to be placed on the PIP. There is nothing which says that the claimant refuses to be put on the PIP.

COW-1 further agreed under cross-examination that the claimant never indicated that he did not wish to be put on the PIP (see p 39 of Notes of Evidence).

I therefore come to the conclusion in the light of the company's own evidence in the instant case as stated above, that the Industrial Court in reaching the conclusion that the claimant had willfully refused to be put on the PIP had failed to have regard to the evidence adduced and came to the decision which was so perverse and devoid of plausible justification.

The Industrial Court's finding that the claimant's wilful refusal to be put on the PIP was clear rejection by him of the company's authority was totally perverse. The perversity of the above is clearly fortified by the Industrial Court's own remark at p 15 of the award when it held:

> The facts show that on 29 August 1997, the claimant was presented with a formal document with regards to the option to resign. It was also conveyed to him what the company will give him if he resigned. The company did not press the claimant for an immediate decision on that day but he was given time until 2 September 1997. At this juncture the claimant did not question the company's right to place him on the PIP or the genuineness of the PIP. It is also pertinent to note that in his letter of 2 September 1997, the claimant did not allege that the company's offer that he resign was a breach although he rejected the company's offer as being derisory and without basis in law.

It follows, therefore, that for the reasons stated above, I hereby allow order in terms of (i) and (iii) and for (ii) remit the matter to Mahkamah Perusahaan Malaysia for remedy.

*Application allowed.*

Reported by Jafisah Jaafar